IS THE DOCTRINE OF THE "POLLOCK CASE" STILL THE LAW?

In upholding the Federal Income Tax Law of 1913, under the Sixteenth Amendment, the Supreme Court of the United States,[1] in disposing of one of the adverse contentions, elaborated the following proposition,—that the Sixteenth Amendment, authorizing the imposition of taxes upon incomes "from whatever source derived," without apportionment, repudiates the classification of the "Pollock case,"[2] insofar as the latter held a tax upon incomes from property to be a direct tax; and that all income taxes are, therefore, henceforth subject to the rule of uniformity. So far-reaching a proposition, even though not indispensable to the decision of the case, invites a critical examination.

The amendment itself[3] contains not even a remote suggestion of a purpose to alter the constitutional classification as theretofore judicially established. To raise by implication a purpose not suggested by the language used, is at best hazardous, and not encouraged by the authorities.[4]

The language of the amendment is, however, positively adverse to the contention of the principal case. The words "without apportionment among the several states and without regard to any census or enumeration," clearly correlate the amendment to Art. I, § 2, cl. 3, of the original Constitution,[5] as providing for a special case to which the general rule laid down in the latter clause shall not apply. A provision for an exception to a general rule is strong evidence that but for such provision the general rule would apply.[6] It follows that the provision that income taxes shall not be subject to apportionment, raises the presumption that these taxes fall within the class which, but for such provision, would be subject to apportionment.

Such would clearly be the construction of the language, had the words constituted a part of the original Constitution. But

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[1] *Brushaber v. Union Pacific Ry. Co.*, 36 Sup. Ct. Rep. (U. S.) 236.

[2] *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429 and 158 U. S. 601.

[3] Art. XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

[4] *State v. McGough*, 118 Ala. 159, 169; *State v. Dillon*, 90 Mo. 229.

[5] Art. I, § 2, cl. 3. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, etc."

[6] *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 191.

an amendment must be presumed to be intended to be read as if incorporated into the original instrument.[7]

Historical antecedents, if invoked, confirm the view here maintained. The amendment was adopted as a result of dissatisfaction with the conclusions of the Pollock case.[8] The decision in that case was reached after the most exhaustive consideration, and its classification of the income tax as direct was perfectly well known. Had the amending power desired to alter this classification it could easily have employed language for the purpose. That it did not do so, is conclusive that its sole object was to authorize the imposition of income taxes without apportionment, regardless of classification.

If it be said that this literal interpretation of the amendment results in a disturbance of the previous "all-embracing" classification of the Constitution into direct and indirect taxes, the former to be apportioned, the latter to be uniform,[9] two answers may be made. First, it has by no means been the unanimous opinion of the profession that this classification was originally all-embracing.[10] Second, the disturbance, if any, must be presumed to have been intentional unless (a) the omitted restrictive or enlarging words may be considered as taken for granted by the framers,[11] or (b) the disturbance was produced by a failure to provide for an unforeseen exceptional consequence of the literal language, such as, if foreseen, would clearly have been obviated by specific provision.[12] Neither of these hypotheses is here admissible. The previous classification of the income tax as direct had been the subject of full discussion, and its importance clearly required any intended alteration to be expressly provided.

Both the reasoning and the authority of the Pollock case are precisely what they were prior to the adoption of the amendment. If the former was valid then, it is valid now. If the latter was binding prior to the adoption, it is binding now. If that decision is to be overruled on the ground obliquely suggested in the earlier case of *Hans v. Louisiana*,[13] of an implied repudiation by the

[7] *Ex parte Turner*, 24 S. C. 211, 214.

[8] Prin. case, pp. 240, 241.

[9] Ib., p. 242.

[10] *Hylton v. U. S.*, 3 Dall. (U. S.) 171, 173. *Pollock v. Co.*, 157 U. S., *supra*, 537 (argument).

[11] See e. g., *State v. Wilson*, 12 Lea (Tenn.) 246.

[12] *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 644. Cf. *People v. Potter*, 47 N. Y. 375.

[13] 134 U. S. 1, 11-12 (reviewing *Chisholm v. Ga.*, 2 Dall. (U. S.) 419).

amending power of an unpopular judicial decision, this is certainly a function of the amending power nowhere recognized in the Constitution. To overrule a thoroughly argued and well considered decision, particularly through a fanciful interpretation of an amendment, is to create a precedent which will more than offset any protective advantage afforded by the rule of uniformity as now narrowly construed[14] by the courts.[15]

C. R. W.

A WITHDRAWN PLEA OF GUILTY ADMISSIBLE AS AN EXTRAJUDICIAL CONFESSION

The Supreme Court of Errors of Connecticut recently decided[1] that where the accused entered a plea of guilty and thereafter withdrew it, on trial for the offense the plea was admissible as an extrajudicial confession, inconsistent with the claim of innocence urged on the subsequent trial, not conclusive, but requiring further proof to establish the *corpus delicti* in order to justify a conviction. The numerous decisions in the courts of England and the United States upon the admissibility of confessions are in a hopeless and irreconcilable conflict, but in examining the historical development of this subject and the reasons for admitting or excluding this kind of evidence, the ruling of the principal case seems correct in principle, and in harmony with the modern and probable future development of the doctrine of confessions.

A plea of guilty before a grand jury or at a preliminary hearing before a magistrate or county judge is admissible in evidence where the defendant pleads not guilty when subsequently put on trial.[2] So, where the defendant had pleaded guilty in a police court for violation of a municipal ordinance the fact that that plea had been entered was admissible when he later pleaded not guilty to an indictment for the same offense under a state statute similar to the ordinance.[3] Where a plea of guilty is offered by the

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[14] *Knowlton v. Moore*, 178 U. S. 41.

[15] For an extrajudicial opinion contrary to the principal case, see Graves, The Income Tax Amendment, XIX Yale Law Journal, 506.

[1] *State v. Carta*, 96 Atl. (Conn.) 411. (Wheeler and Roraback, JJ., *dissenting*.)

[2] *Browning v. State*, 142 S. W. (Tex.) 1; *People v. Gould*, 70 Mich. 240; *Green v. State*, 40 Fla. 474.

[3] *Bibb v. State*, 83 Ala. 84; *Ehrlick v. Commonwealth*, 31 Ky. Law Rep. 401, 102 S. W. 289.